SUPREME COURT, U. S.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1860

MAKAH DEVELOPMENT CORPORATION, et al.,
Petitioners,
v.
STANLEY T. SCOTT & CO., INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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This case involves the question whether admiralty jurisdiction of the federal court should be expanded by court decision to encompass contracts preliminary to admiralty contracts.

In the judgment below, the 9th Circuit Court of Appeals erased the long-standing distinction between preliminary contracts and admiralty contracts on the novel legal theory that the two are integrally related and therefore all lie within admiralty jurisdiction.

Because the decision of the Circuit Court marks a new departure from an unbroken line of cases to the contrary

and vastly increases admiralty jurisdiction in the face of conflicting Supreme Court decisions, petitioners seek a writ of certiorari to review the judgment.

OPINION BELOW

The opinion of the 9th Circuit Court of Appeals is reported as *Stanley T. Scott & Co., Inc. v. Makah Development Corporation,* No. 71-2983 (April 8, 1974), ... F.2d ..... (1974), and is reproduced as Appendix A to this Petition.

JURISDICTION

The jurisdiction of the Supreme Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Does the federal court have admiralty jurisdiction over the subject matter of a separable contract to procure a maritime insurance contract?

2. Should admiralty jurisdiction of the federal court be expanded by court decision to encompass contracts preliminary to admiralty contracts?

STATUTE INVOLVED

28 U.S.C. §1333, Volume 7, page 7568 (1970):

> §1333. Admiralty, maritime and prize cases
>
> The district court shall have original jurisdiction, exclusive of the courts of the States, of:
>
> (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.
>
> • • •

STATEMENT OF THE CASE

Petitioners are the Makah Development Corporation, a Washington corporation organized for the purpose of managing a fleet of ten fishing vessels for the Makah Indian Tribe, and ten Makah Indians who are skippers of the vessels in the fleet. Respondent, Stanley T. Scott & Co., Inc. is an insurance broker in Seattle, Washington.

In early 1970, respondent offered to procure a maritime insurance policy for petitioners. Following negotiations, respondent procured the maritime insurance policy and loaned petitioners the premiums for one year by advancing funds to the three underwriters who subscribed to the policy. Thus respondent was party to a loan contract with petitioners on the one hand, and the three underwriters were parties to a different and separable maritime insurance contract with petitioners on the other. Respondent was *not* a party in any sense to the maritime insurance contract.

Respondent brought an action in the District Court upon its loan contract with petitioners but characterized it as a "suit for collection of insurance premiums". The complaint is reproduced as Appendix B to this Petition.

Petitioners moved to dismiss the complaint on the ground that the contract relied upon by respondent was a contract *preliminary* to an admiralty contract and therefore not within the admiralty jurisdiction of the federal court and on the ground that the federal court had no jurisdiction over the individual Indian petitioners in the absence of admiralty jurisdiction.

On January 13, 1971, the District Court entered an in-

terim denial of the motion to dismiss and on September 29, 1971, the District Court entered a permanent denial of the motion to dismiss and granted respondent summary judgment.

On October 29, 1971, petitioners filed a Notice of Appeal and on April 8, 1974 the 9th Circuit Court of Appeals upheld the District Court in a 2-1 split decision.

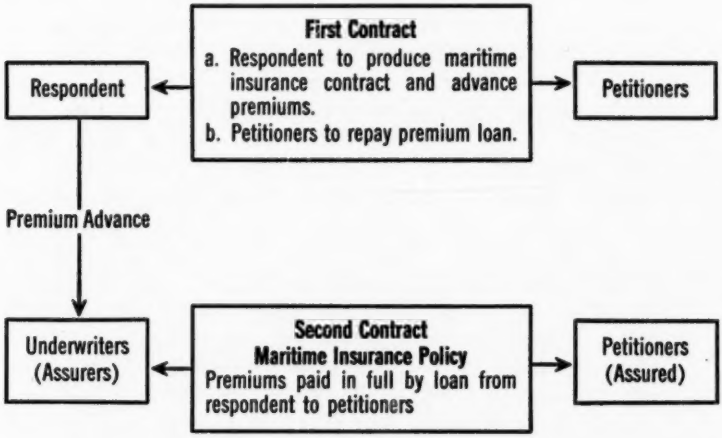
REASONS FOR GRANTING THE WRIT

1. This Action is Not Grounded Upon a Maritime Insurance Contract and Does Not Come Within the Admiralty Jurisdiction of the Federal Court

This is a jurisdiction case. Like all jurisdiction cases, it involves subtle distinctions. The line between "maritime contracts" and "contracts leading to the execution of maritime contracts" is admittedly a fine line—so fine that like the Dedekind Cut in mathematics, it is a line without width. On one side of the line contracts are maritime contracts; on the other side, they are not. A maritime insurance policy is on the "maritime contract" side of the line; a contract to procure a maritime insurance policy is on the "non-maritime contract" side of the line.

In its complaint, respondent attempts to meld the separable, non-maritime loan contract between respondent and the petitioners with the maritime insurance contract between the underwriters and the petitioners. The 9th Circuit Court of Appeals accepts respondent's analysis by holding that the loan contract is "integrally related to the maritime insurance policy" and therefore "arises out of a maritime contract." But in so holding, the Circuit Court throws out the baby with the bath by completly eradicating the distinction between maritime contracts and con-

tracts preliminary to maritime contracts. The subtle but crucial distinction between the preliminary loan contract and the maritime insurance contract in this case is demonstrated graphically in the following diagram.



The dissenting opinion of the Honorable Judge Wallace in the 9th Circuit Court of Appeals correctly analyzes the law:

> The majority has needlessly expanded federal jurisdiction to encompass a suit on a contract to procure marine insurance, a cause of action which has never been within the admiralty jurisdiction. While a policy of marine insurance is a maritime contract, *Insurance Co. v. Dunham*, 78 U.S. (11 Wall.) 1 (1870), a contract to procure marine insurance is not any more maritime than a contract to build or sell a ship, actions which are also not within admiralty jurisdiction.
>
> Because of the difference between marine insurance and other forms of insurance, a suit on the marine insurance policy requires the application of special ad-

miralty rules over which a substantial body of law has developed. Such a suit is peculiarly maritime. But an action on a contract to procure insurance or one for insurance premiums does not involve admiralty law; it involves basic common-law contract doctrine. *There is nothing peculiarly maritime about a suit for insurance premiums just because it is on a marine insurance policy. No special aspect of maritime law or maritime matters is involved. That a contract may in some extended way deal with ships does not change a simple breach of a common-law obligation to pay money into an admiralty action.* Aware of this distinction, the district courts in this circuit have held that contracts to procure marine insurance are not within admiralty jurisdiction. *Warner v. The Bear,* 126 F. Supp. 529, 530-31 (D.C. Alaska Co., 75 F. Supp. 404 (W.D. Wash. 1948). In a line of cases extending back to 1822 [*Andrews v. Essex Fire & Marine Ins. Co.,* 1 F. Cas. 885, No. 374 (C.C. Mass. 1822)] many other district and circuit courts have not consistently held that a contract to procure marine insurance is not within admiralty jurisdiction that one would have thought that the rule was as well settled as any black letter rule out of a hornbook, *St. Louis Shipbuilding & Steel Co. v. Petroleum Barge Co., Inc.,* 249 F.2d 905, 908 (8th Cir. 1956); *Koch-Ellis Marine Contractors, Inc. v. Phillips Petroleum Co.,* 219 F.2d 520, 521 n.2 (5th Cir. 1955); *The Barryton,* 54 F.2d 282, 284 (2d Cir. 1931); *Virginia-Carolina Chemicel Co. v. Chesapeake Lighterage & Towing Co.,* 279 F. 684 (2d Cir. 1922); *David Crystal, Inc. v. Cunard Steamship Co.,* 223 F. Supp. 273, 293 (S.D. N.Y. 1963), *aff'd.,* 339 F.2d 295, (2d Cir. 1964), *cert. denied,* 380 U.S. 976 (1965); *D.C. Andrews and Co., Inc. v United States,* 124 F. Supp. 362, 363 (C.Cl. 1954); *The D. T. Gilmartin,* 66 F. Supp. 382 (E.D. N.Y. 1946); *Reliance Lumber Co. v. Rothschild,* 127 F. 745, 748-49 (E.D. Pa. 1904); *The City of Clarksville,* 94 F. 201, 205 (D. Ind. 1899); *Marquardt v. French,* 53 F. 603 (S.D. N.Y. 1893); *The Thames,* 10 F. 848 (S.D. N.Y. 1881).

Slip Opinion at 2. (Emphasis supplied)

Respondent placed great reliance upon *Grow v. Loraine K*, 310 F.2d 547 (6th Cir. 1962), and the majority cited the *Grow* case in its opinion. But an analysis of the *Grow* case indicates that both respondent and the majority are grasping at straws, for *Grow* involves an altogether different and irrelevant sub-category of admiralty jurisdiction.

In *Grow*, an attorney for the owner of the Loraine K ordered insurance policies from brokers. Policies were issued and the brokers sent bills for the premiums which were not paid. The brokers later sued for the premiums in state court in Michigan. When the owners of the Loraine K went bankrupt, the brokers sued in admiralty upon a state statute, *Michigan Statutes, Annotated*, §26.342 which reads in part as follows:

> §26.342 *Liens upon certain watercraft for certain debts.* Sec. 2. Every watercraft of above five [5] tons burthern, used, or intended to be used, in navigating the waters of this state, shall be subject to a lien thereon—
>
> For sums due for . . . insurance.

In the *Grow* decision, the 6th Circuit Court of Appeals pointed out that an *in personam* action to enforce a maritime insurance contract is within admiralty jurisdiction. It then distinguished the broker's claim *in rem* as within a separate category of admiralty jurisdiction, namely a maritime lien upon a vessel for insurance premiums created by a Michigan Court in admiralty. The Circuit Court held in part:

> The broker's sole reliance for a lien is on the Michigan statute.
>
> • • •
>
> State legislation, maritime in nature *but applicable*

> *to areas not considered by federal maritime law* or covered by enactments of Congress, is enforceable in the federal courts and this includes state statutes creating *in rem* liens for insurance premiums. 1 Benedict *Admiralty* (6th Ed.), sec. 35, pp. 79-83; 2 Am. Jur. 2d *Admiralty*, sec. 70, p. 759, sec. 92, pp. 772, 773.
>
> (Emphasis supplied)

Thus the Circuit Court recognized that but for the state statute creating an *in rem* lien upon a vessel the action by the brokers would not have been within admiralty jurisdiction. Washington has no statute creating a lien for unpaid premiums on maritime insurance policies, and therefore this case does not fit within the admiralty jurisdiction subcategory invoked in the *Grow* case. *Grow* is altogether irrelevant.

2. The Admirality Court Will Not Take Jurisdiction Over Separable, Non-Maritime Elements of a Contract

Respondent attempted to characterize this action as one for "collection of insurance premiums" but failed to point out that the premiums were paid in full to the underwriters and therefore the amount paid constitutes nothing more than a loan from respondent to petitioners. The efficacy of the loan contract in procuring the maritime insurance contract does not make the two contracts inseparable, and in the case of valid admiralty contracts, the admiralty court is ousted of jurisdiction over all non-maritime elements which are separable from maritime elements. *D. C. Andrews & Co. v. United States*, 1954 A.M.C. 2221, 124 F. Supp. 362 (Ct. Cl., 1954); *Flota Maritima Browning De Cuba, (DeCuba S.A.) v. Snobl*, 363 F.2d 733 (4th Cir. 1966).

In this case, the loan contract and the maritime insurance contract are easily separable and as stated in *D. C. Andrews & Co., Inc., supra*:

> . . . non-maritime portions of otherwise maritime contracts may be severed and in fact must be, since the admiralty court will not take jurisdiction of causes of action arising out of them.
>
> 124 F. Supp. at 365.

Indeed, in *Flota Maritima, supra,* the problem of separability was more difficult than in this case since it involved a ship lease-purchase agreement providing the lessee an option to purchase by applying previously paid rentals to the purchase price and converting the lease into a contract of sale secured by a marine mortgage. Faced with miscegenation of a non-maritime sale contract and a maritime lease contract, the 4th Circuit Court of Appeals held:

> While the principle is one of general validity when the non-maritime elements of the contract are substantial and inseparable from the maritime elements, it has long been recognized that where the maritime elements of a contract are susceptible to separate adjudication *admiralty jurisdiction may be exercised to that extent. Compagnie Franchise De Navigation a Vapeur v. Bonasse,* 2 Cir., 19 F.2d 777, 779; *Eastern Massachusetts Street Ry. Co. v. Transmarine Corp.,* 1 Cir. 42 F.2d 58; *Berwind-White Coal Mining Co. v. City of New York,* 2 Cir. 135 F.2d 443.
>
> [7] We agree with the District Judge, largely for the reasons expressed by him in a thoughtful opinion, that *the maritime aspects of this lease-purchase agreement are separable* and that the specific claims may be adjudicated in an admiralty court.
>
> (Emphasis supplied. Footnotes omitted) 363 F.2d at 735.

Flota Maritima makes clear that when non-maritime ele-

ments are *inseparable* from admiralty elements, then admiralty court is ousted of jurisdiction altogether.

3. The Supreme Court Should Reject Expansion of Admiralty Jurisdiction by Court Decision

It is the very nature of contracts preliminary to admiralty contracts that they are related to maritime contracts and must be distinguished from them through precise analysis. The rule enunciated by the 9th Circuit Court of Appeals makes analysis unnecessary and expands maritime jurisdiction to encompass all contracts preliminary to maritime contracts. If the decision is allowed to stand, the fear expressed by the court in *The Thames*, 10 F. 848 (D.C. N.Y. 1881) will at last have become a reality:

> The distinction between preliminary services leading to a maritime contract and such contracts themselves have been affirmed in this country from the first, and not yet departed from. It furnishes a distinction capable of somewhat easy application. If it be broken down, I do not perceive any other dividing line for excluding from the admiralty many other sorts of claims which have a reference, more of less near or remote, to navigation and commerce. *If the broker of a character-party be admitted, the insurance broker must follow—the drayman, the expressman, and all others who perform services having reference to a voyage either in contemplation or executed.*
>
> (Emphasis supplied) 10 F. at 848.

As stated by Judge Wallace in his dissenting opinion below:

> The necessities of international trade and commerce dictate that the development of maritime law should be along uniform lines. Because the majority opinion directly contravenes an established admiralty rule, destroys the uniformity in application of that rule and constitutes an unwarranted expansion of federal juris-

> diction which will needlessly funnel into our already overburdened federal system, I would reverse the case and order it dismissed for lack of jurisdiction.
>
> Slip Opinion at 3.

The unwarranted expansion of maritime jurisdiction by the 9th Circuit Court of Appeals is in conflict with the latest decisions of the Supreme Court on the point. In *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 34 L. Ed. 2d 454, 93 S. Ct. 493 (1972), the Supreme Court unanimously rejected the purely mechanical locality test for determining admiralty jurisdiction. In its Opinion, the Supreme Court reiterated its own earlier observation in *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 30 L. Ed. 2d 382, 92 S. Ct. 418 (1971) that in determining whether to expand admiralty jurisdiction, "we should proceed with caution . . ." 202 U.S. at 212.

The decision of the 9th Circuit Court of Appeals to allow a vast expansion of admiralty jurisdiction in the face of solidly established and universally recognized authority to the contrary is incautious and ill-advised.

CONCLUSION

For the reasons stated, petitioners respectfully request that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Ninth Circuit in *Stanley T. Scott & Co., Inc. v. Makah Development Corporation*, No. 71-2983 (April 8, 1974), or, in the alternative, that the judgment be reversed.

Respectfully submitted,

ZIONTZ, PIRTLE, MORISSET
& ERNSTOFF
ROBERT L. PIRTLE
Attorneys for Petitioners

June 10, 1974

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STANLEY T. SCOTT & CO., INC., a Washington corporation, *Appellee,* v. MAKAH DEVELOPMENT CORPORATION, et al., *Appellants.*	No. 71-2983 OPINION

[April 8, 1974]

Appeal from the United States District Court
for the Western District of Washington

Before: DUNIWAY, HUFSTEDLER, and WALLACE, Circuit Judges.

HUFSTEDLER, Circuit Judge:

Appellee Stanley T. Scott & Co., Inc. ("Scott"), a marine insurance broker, at appellants' request obtained underwriters who subscribed Marine Hull and Protection and Indemnity insurance for appellants' fishing fleet; Scott placed an oral binder for the required coverage and advanced the necessary premiums. The policy thereupon issued, and appellants failed to reimburse Scott for the premiums. The issue on appeal is whether Scott's claim to recover its advanced premiums is within admiralty jurisdiction conferred by 28 U.S.C. §1333.

Scott's implied-in-law contractual right to reimbursement for the premiums is integrally related to the marine insurance policy that emerged from appellants' bargain with Scott. (*Cf.* Gilmore and Black, *The Law of Admiralty*, §2-3, p. 52 (1957).) A marine insurance policy is a "maritime contract." (*Insurance Co. v. Dunham* (1870) 78 U.S.

1.) Scott's claim "arises out of a maritime contract," and it is thus within admiralty jurisdiction. (*City of Athens* (1956) 350 U.S. 532; *cf. Grow v. Loraine K* (6th Cir. 1962) 310 F.2d 547.)

Affirmed.

WALLACE, Circuit Judge, Dissenting:

The majority has needlessly expanded federal jurisdiction to encompass a suit on a contract to procure marine insurance, a cause of action which has never been within the admiralty jurisdiction. While a policy of marine insurance is a maritime contract, *Insurance Co. v. Dunham*, 78 U.S. (11 Wall.) 1 (1870), a contract to procure marine insurance is not any more maritime than a contract to build or to sell a ship, actions which are also not within admiralty jurisdiction.

Because of the difference between marine insurance and other forms of insurance, a suit on a marine insurance policy requires the application of special admiralty rules over which a substantial body of law has developed. Such a suit is peculiarly maritime. But an action on a contract to procure insurance or one for insurance premiums does not involve admiralty law; it involves basic common-law contract doctrine. There is nothing peculiarly maritime about a suit for insurance premiums just because it is on a marine insurance policy. No special aspect of maritime law or maritime insurance matters is involved. That a contract may in some extended way deal with ships does not change a simple breach of a common-law obligation to pay money into an admiralty action. Aware of this distinction, the district courts in this circuit have held that contracts to procure marine insurance are not within admiralty jurisdiction. *Warner v. The Bear*, 126 F. Supp. 529, 530-31 (D.C.

Alaska 1955); *Puget Sound Nav. Co. v. Puget Sound Tug & Barge Co.*, 75 F. Supp. 404 (W.D. Wash. 1948). In a line of cases extending back to 1822 [*Andrews v. Essex Fire & Marine Ins. Co.*, 1 F. Cas. 885, No. 374 (C.C. Mass. 1822)], many other district and circuit courts have so consistently held that a contract to procure marine insurance is not within admiralty jurisdiction that one would have thought that the rule was as well settled as any black letter rule out of a hornbook. *St. Louis Shipbuilding & Steel Co. v. Petroleum Barge Co., Inc.*, 249 F.2d 905, 908 (8th Cir. 1957); *Koch-Ellis Marine Contractors, Inc. v. Phillips Petroleum Co.*, 219 F.2d 520, 521 n.2 (5th Cir. 1955); *The Barryton*, 54 F.2d 282, 284 (2d Cir. 1931); *Virginia-Carolina Chemical Co. v. Chesapeake Lighterage & Towing Co.*, 279 F. 684 (2d Cir. 1922); *David Crystal Inc. v. Cunrad Steamship Co.*, 223 F. Supp. 273, 293 (S.D. N.Y. 1963); *aff'd.*, 339 F.2d 295 (2d Cir. 1964), *cert. denied*, 380 U.S. 976 (1965); *D. C. Andrews and Co., Inc. v. United States*, 124 F. Supp. 362, 363 (C.Cl. 1954); *The D. T. Gilmartin*, 66 F. Supp. 382 (E.D. N.Y. 1946); *Reliance Lumber Co. v. Rothschild*, 127 F. 745, 748-49 (E.D. Pa. 1904); *The City of Clarksville*, 94 F. 201, 205 (D. Ind. 1899); *Marquardt v. French*, 53 F. 603 (S.D. N.Y. 1893); *The Thames*, 10 F. 848 (S.D. N.Y. 1881).

The necessities of international trade and commerce dictate that the development of maritime law should be along unifrom lines. Because the majority opinion directly contravenes an established admiralty rule, destroys the uniformity in application of that rule and constitutes an unwarranted expansion of federal jurisdiction which will needlessly funnel cases into our already overburdened federal system, I would reverse the case and order it dismissed for lack of jurisdiction.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

STANLEY T. SCOTT & CO., INC., a Washington corporation,
Plaintiff,
v.
MAKAH DEVELOPMENT CORPORATION; BENDER JOHNSON, SR., and JANE DOE JOHNSON, his wife and the marital community composed thereof; BENDER JOHNSON, JR., and JANE DOE JOHNSON, his wife and the marital community composed thereof; JULIUS IDES, and JANE DOE IDES, his wife and the marital community composed thereof; HILARY IRVING, and JANE DOE IRVING, his wife and the marital community composed thereof; WILLIAM WHEELER and JANE DOE WHEELER, his wife and the marital community composed thereof; EMIL SWAN and JANE DOE SWAN, his wife and the marital community composed thereof; PAT WILKIE and JANE DOE WILKIE, his wife and the marital community composed thereof; HUBERT MARKISHTUM and JANE DOE MARKISHTUM, his wife and the marital community composed thereof; HERBERT DANIELS and JANE DOE DANIELS, his wife and the marital community composed thereof; CHARLES E. PETERSON, SR., and JANE DOE PETERSON, his wife and the marital community composed thereof; and CHARLES E. PETERSON, JR., and JANE DOE PETERSON. his wife and the marital community composed thereof;
Defendants,
and
SIMON PHILIP PARKER and JANE DOE PARKER, his wife and the marital community composed thereof;
Additional Defendants.

IN ADMIRALTY

No. 9358

AMENDED COMPLAINT

I.

This is a suit for collection of insurance premiums advanced for hull and P & I coverage on fishing vessels. Jurisdiction rests in this court pursuant to 28 USCA Sec. 1333.

II.

Plaintiff is a Washington corporation licensed to do business in the State of Washington, and has paid all license fees due the state. Plaintiff is an insurance broker whose principal place of business is Seattle, Washington.

III.

Defendant Makah Development Corporation is a Washington corporation doing business and found within the jurisdiction of this court.

IV.

Defendants, Bender Johnson, Sr. and his wife; Bender Johnson, Jr. and his wife; Julius Ides and his wife; Hilary Irving and his wife; William Wheeler and his wife; Emil Swan and his wife; Pat Wilkie and his wife; Hubert Markishtum and his wife; Herbert Daniels and his wife; Charles E. Peterson, Sr. and his wife; and Charles E. Peterson, Jr. and his wife; and Simon Philip Parker and his wife; are residents of Clallam County, State of Washington, and were at all times material hereto the owners of various fishing vessels covered by the insurance described hereinafter. All acts of any spouse named herein were done on behalf of and for the benefit of the marital community of which he or she is a member.

V.

On or about December 31, 1969 plaintiff, at defendants request, obtained and put into effect as of December 31,

1969, hull P & I binders with limits of $382,500 and $300-000, respectively, covering vessels owned and operated by the defendants named herein. Plaintiff, at defendants request, thereupon advanced the premium for said coverage in the amount of $26,162.00.

VI.

Said binder was confirmed in Plaintiff's Subscription Policy #SSP 1040, effective December 31, 1969 to December 31, 1970, which policy covered the defendants and the vessels described in paragraph IV above.

VII.

At defendants request the Small Business Administration was named as a loss payee upon the hull coverage, it having a security interest in the vessels insured therein.

VIII.

Said coverage has remained in effect until September 23, 1970 wherein it was cancelled upon written notice to defendants. In accordance with said policy the sum of $7,-093.58 is an offset against the total premium as credit for early termination.

IX.

Defendants jointly and severally are liable to plaintiff in the amount of $26,162.00, less an offset of $7,093.58, plus interest upon the toal premium of $26,162.00 from December 31, 1969 at 8% per annum, to September 23, 1970, and on sum of $19,068.42 from September 23, 1970 to date of judgment.

WHEREFORE, plaintiffs pray for relief against each of the named defendants, jointly and severally, as follows:

1. Judgment in the amount of $26,162.00 plus interest at the rate of 8% per annum from December 31, 1969 to date of judgment;

2. For plaintiffs costs and disbursements herein;

3. For such other and further relief as the court may deem proper.

DATED this 29 day of March, 1971.

MORIARTY, LONG, MIKKELBORG & BROZ
CHARLES E. WATTS
Attorney for Plaintiff